STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(Before Owens, P.J., and Schuette and Borrello, J.J.)

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD, State Representative in her official capacity,

Plaintiffs/Appellees,

v.

THE STATE OF MICHIGAN,

Defendant/Appellant,
and

GAMING ENTERTAINMENT, LLC, and LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Intervening Defendants/Appellees,
and

NORTH AMERICAN SPORTS MANAGEMENT CO.,

Intervening Defendant.

Supreme Court No. 129818

Court of Appeals No. 225017

Ingham County Circuit Court
No. 99-90195-CZ

REPLY BRIEF OF STATE OF MICHIGAN AS APPELLANT

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

ORAL ARGUMENT REQUESTED

BARRIS, SOTT, DENN & DRIKER, P.L.L.C.
Eugene Driker (P12959)
Thomas F. Cavalier (P34683)
Special Assistant Attorneys General
for the State of Michigan
211 West Fort Street, 15th Floor
Detroit, Michigan 48226-3281
(313) 965-9725

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

INTRODUCTION

TOMAC's Appellee Brief utterly fails to show why the Amendment Provision or the LTBB Amendment violates the Separation of Powers Clause of the Michigan constitution.[1] Therefore, the Court of Appeals' holding that they are unconstitutional should be reversed.

The Court of Appeals based its holding entirely upon the supposition that the Amendment Provision represented a unilateral delegation of legislative amending authority to the Governor. That assumption is at odds with the clear bilateral nature of the provision, which has force only because both the State and the Tribe agreed to it. TOMAC responds to this argument by distorting the previous position of the State on this issue as well as mischaracterizing the arguments made by the State in this Court. Such tactics cannot prevail over the State's reasoned basis for upholding the Amendment Provision.

TOMAC also argues that the Amendment Provision is unconstitutional because it places no limits on the Governor's authority, an issue not decided by the Court of Appeals. The provision, however, significantly restricts the Governor, *i.e.*, she cannot agree to amendments that expand the geographic boundaries of tribal gaming. Moreover, Michigan's courts have traditionally given wide latitude to the Governor in the exercise of conferred authority. Thus, the Governor's amending authority is well within constitutional bounds.

Finally, TOMAC says that the LTBB Amendment on its face violates the Appropriations Clause, another issue that was not decided by the Court of Appeals. A facial challenge succeeds only if there is *no* valid application of the provision in question. Here, the LTBB Amendment provision plainly allows the Governor to direct tribal payments to the State Treasury, where they would be

[1]Capitalized terms used in this Reply Brief, such as "TOMAC", "Amendment Provision" and "LTBB Amendment", have the same meaning as in the State's Appellant Brief.

subject to appropriation. Thus, TOMAC's facial challenge fails.

ARGUMENT

I. THE AMENDMENT PROVISION DOES NOT VIOLATE THE SEPARATION OF POWERS CLAUSE.

A. The Governor's Amending Authority Does Not Result From A Unilateral Act Of The Legislature.

The Court of Appeals held that the Amendment Provision violated the Separation of Powers Clause because the Governor's amending authority under that provision could only be conferred by the Legislature by statute; a resolution, it held, was insufficient for that purpose.[2] That holding was incorrect because the Governor's authority does not result from a *unilateral* delegation of legislative contracting power to the Governor. Instead, the source of the Governor's authority is a mutual agreement between the State and the Tribe. That agreement is one of the "ground rules" for modification of the Compact that are delineated in the Amendment Provision. Under this Court's decision in *Taxpayers of Michigan Against Casinos v State*, 471 Mich 306; 685 NW2d 221 (2004) ("*TOMAC I*"), the Amendment Provision was properly approved by legislative resolution as were the other provisions of the Compact.

TOMAC has offered no credible response to this argument. Initially, it says that the State took a contrary position before the Court of Appeals by characterizing the Amendment Provision as a delegation of contracting authority to the Governor. But the key to the State's argument here is that

[2]The Brief of *Amici Curiae* Senator Ken Sikkema and Senator Shirley Johnson takes the position that the Amendment Provision does not purport to authorize the Governor to agree to amendments on behalf of the State, but only to "receive" and "propose" them. (Brief of Senator Sikkema and Johnson, pp. 20-24.) Neither the State nor the Tribe nor even TOMAC has ever interpreted Section 16 in that way. Furthermore, the *Amici*'s interpretation is flatly refuted by the language of the provision. It says that the described procedure is a way of achieving an amendment "by *mutual agreement between the Tribe and the State*." (Compact §16; App at 78a; emphasis supplied.) Clearly, the described procedure results in an *agreement* between the parties because the Governor acts "on behalf of the State" for the purpose of binding the State to the amendment.

the Governor's authority did not result from a *unilateral* delegation or other unilateral act of the Legislature. The State advanced the same view in the Court of Appeals: "The Governor's authorization to consent to an amendment on behalf of the State did not result from a *unilateral* act of the Legislature. Rather, it derives from the Compacts. *It is part of an amending procedure which the State and tribes created when they both approved the Compacts*." (State's Reply to TOMAC's Supplemental Brief on Remand at 3; emphasis supplied.)[3]

Second, TOMAC says that the State's argument is "bad constitutional law" because it "trumps" constitutional protections by "contracting around them[.]" (TOMAC Appellee Brief at 9.) This grandiose language disguises a rather commonplace principle of contract (not constitutional) law, namely, that a contract is void if it is contrary to public policy as expressed in the constitution, statutes or judicial opinions. *Skutt v City of Grand Rapids*, 275 Mich 258; 266 NW 344 (1936), upon which TOMAC relies, was decided on the basis of that principle, holding that the plaintiff's purported contract with the defendant city was "contrary to public policy[.]" Furthermore, TOMAC's citation of this principle only begs the question, which asks whether the Amendment Provision *is* contrary to the constitution. Finally, TOMAC's "example" of "contracting around" the law is irrelevant. The problem with a compact providing that the Tribe could sue in circuit court on a hypothetical question is that it purports to change the law and would, therefore, be invalid as "legislation." *See Harsha v City of Detroit*, 261 Mich 586, 590; 246 NW 849 (1933) ("The

[3]Furthermore, the passages from the State's Supplemental Brief on Remand cited by TOMAC do not concern the issue of whether the Amendment Provision unilaterally delegates contracting authority to the Governor, which was not an issue the Court of Appeals asked the parties to brief. Rather, they concern the separate issue of whether the discretion given to the Governor, however delegated, complies with the traditional "standards" test used by this Court in evaluating whether delegations of legislative power violate the Separation of Powers Clause. For that purpose alone, the Amendment Provision may be considered a "delegation" (although a bilateral one) of contracting authority to the Governor.

legislative power is the authority to make, *alter*, *amend*, and repeal *laws*.") (Emphasis supplied.) The Amendment Provision has no such effect.

Third, TOMAC says that the State argues that the Amendment Provision will be rendered meaningless unless it is interpreted "to allow the Governor the unilateral power to amend the compacts[.]" (TOMAC's Appellee Brief at 10.) TOMAC has distorted the State's argument. What the State actually says in its brief is that the Amendment Provision would be meaningless *unless the parties were "bound by a conforming amendment,"* not that it would be meaningless unless it gave amending authority to the Governor. (State's Appellant Brief at 17-18; emphasis supplied.) Even an amending procedure that said nothing about the Governor's authority would be meaningless if a conforming amendment bound no one. The point is that the Legislature, by approving an amending *procedure* (whatever its terms), gave its consent as well to amendments conforming to that procedure. Thus, the Amendment Provision does not permit an amendment "without legislative approval," as the Court of Appeals found.

Finally, TOMAC says that the State has argued that *Roxborough v Michigan Unemployment Compensation Comm*, 309 Mich 505; 15 NW2d 724 (1944), "is inconsistent with *TOMAC I's* holding that Tribal-State gaming compacts can be approved by mere resolution." (TOMAC's Appellee Brief at 11; footnote omitted.) Again, TOMAC has mischaracterized the State's argument. The cases themselves are not inconsistent. Rather, it is "the Court of Appeals' *application of Roxborough to this case* [that] conflicts with this Court's opinion in *TOMAC I*." (State's Appellant Brief at 20; emphasis supplied.)

In light of *TOMAC I, Roxborough* should not be extended to amending authority that has been conferred by a contract. *Roxborough* considered a situation where the Legislature purported to confer contracting authority on the Governor through a unilateral act, which, in that case, was the

unemployment compensation act. With only a unilateral delegation of contracting authority in mind, the *Roxborough* Court held that a statute was required for such delegation. It did not envision a case where, as here, the source of the Governor's authority is not a unilateral act of the Legislature, but a bilateral agreement. In that situation, *TOMAC I* instructs that the constitution leaves the Legislature free to use non-statutory means, such as a resolution, to confer that authority.

B. The Scope of the Governor's Amending Authority Does Not Violate the Separation Of Powers Clause.

The Governor's amending authority was not only properly approved by legislative resolution, the scope of her authority meets the traditional standards test of the Separation of Powers Clause as well. TOMAC's argument to the contrary should be rejected.

While the Separation of Powers Clause provides that "[n]o person exercising the powers of one branch shall exercise powers properly belonging to another branch", Const 1963, art 3, § 2, it does not require that the actions of the three branches of government be confined to rigid, impermeable compartments. The "doctrine of separation of powers . . . is a structural safeguard, a prophylactic device, rather than an immutable principle . . ." *Quinton v General Motors Corp*, 453 Mich 63, 89; 551 NW2d 677 (1996). It does not "mean that the branches must be kept wholly separate." *Soap & Detergent Ass'n v Natural Resources Comm'n*, 415 Mich 728, 752; 330 NW2d 346 (1982). Rather, it permits an "overlap of responsibilities and powers." *Judicial Attorneys Ass'n v State*, 459 Mich 291, 296; 586 NW2d 894 (1998). Power-sharing is constitutionally permissible "[i]f the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other[.]" *Id*, 459 Mich at 296.

The Amendment Provision expressly limits the Governor's authority. Specifically, the Governor lacks the authority to agree to an amendment that expands the definition of "eligible

Indian lands." *See* Section 16(A)(iii); App at 78a ("[n]either the tribe or the State may amend the definition of 'eligible Indian lands' to include counties other than those set forth in Section 2(B)(1) of this Compact."). This restriction is significant because the Tribe may operate a casino only on its eligible Indian lands. *See* Compact, §3(A); App at 66a ("The Tribe may lawfully conduct the following Class III games *on eligible Indian lands* . . . .") (Emphasis supplied.). Consequently, the Amendment Provision forbids the Governor from agreeing to the expansion of the Tribe's gaming operations beyond that geographic area.[4]

The decision to accept or reject other amendment terms is left to the Governor's discretion. This is entirely permissible. Here, it is critical that the Legislature has not left this decision to an agency or a subordinate officer within the executive branch. Instead, the Legislature has confided such decision-making to a coordinate branch of government – the Governor herself.

This Court has long deferred to the Governor's discretion in exercising authority conferred by the Legislature. Over one hundred years ago, this Court recognized that the Legislature may leave matters to the discretion of the Governor, as opposed to a subordinate in the executive branch, because "his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance" than would be expected from a subordinate. *Sutherland v Governor*, 29 Mich 320, 323 (1874). This Court has been loath to question the Legislature's decision to confer authority on the Governor. "[R]easons of a conclusive nature must be presumed to have been found, requiring the particular authority to be confided to the chief executive as one

[4]TOMAC argues that this restriction is "irrelevant" because the "power to amend necessarily includes the power to contract around any previously agreed upon limitation." (TOMAC's Appellee Brief at 14.) This argument misinterprets the restriction. The prohibition on expanding the geographic boundaries of the Tribe's gaming activities is a restriction on the *Governor's* amending authority. While the Legislature and the Tribe may allow gaming beyond existing boundaries by directly approving an amendment to that effect, Section 16 of the Compact does not permit the Governor to bind the State to such an amendment.

properly and peculiarly, if not exclusively pertaining to the department which he represents." *Id* at 329. Consequently, the courts do not interfere with the exercise of the Governor's discretion. "The governor holds an exalted office . . . It would be unbecoming in us to impugn his motives, and *unseemly and unlawful to invade his discretion*." *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999) quoting *People ex rel Johnson v Coffey*, 237 Mich 591, 602; 213 NW 460 (1927) (emphasis supplied). *Accord, Born v Dillman*, 264 Mich 440, 443-444; 250 NW 282 (1933) ("While the duty thus imposed on [the governor] may be said to be ministerial only, and not political, it calls for the exercise of judgment on his part, and is not subject to judicial control."), *People ex rel Ayers* v *Board of State Auditors*, 42 Mich 422, 426; 4 NW 274 (1880) ("[W]e cannot interfere with the discretion of the chief executive of the state[.]").

Because of this Court's long-standing deference to the Legislature's grant of discretion to the Governor, the absence of restrictions on that discretion does not necessarily raise a Separation of Powers problem. In *Flint City Council v State*, 253 Mich App 378, 391; 655 NW2d 604 (2002), the Court of Appeals held that the lack of statutorily prescribed procedural requirements for a review hearing to be conducted by the Governor under the Local Government Fiscal Responsibility Act did not mean that there were no requirements. Instead, it meant that the Legislature intended the Governor to supply them. The Court of Appeals began by observing that the "standards" test that applies to constitutional challenges to legislative power delegated to an administrative agency does not extend to authority conferred upon the Governor.

> Although the Supreme Court has held that the Legislature must provide an administrative agency with standards for the exercise of the power delegated to it, *Blank v Dep't of Corrections*, 462 Mich 103, 124; 611 NW2d 530 (2000), *we are not dealing here with an administrative agency; rather, this case involves a decision by the chief executive officer of the state, who stands on an equal level with the*

> *Legislature and the judiciary*. "The Governor's power is limited only by constitutional provisions that would inhibit the Legislature itself." *Straus, supra* at 534. *Flint City Council,* 253 Mich App at 391 (emphasis supplied).[5]

The Court of Appeals explained that separation of powers principles limit the extent to which the Legislature may restrict the exercise of executive authority. "It is further well-established that while the Legislature can authorize the exercise of executive power, *it cannot place conditions on the exercise of that authority without violating the constitutional principle of separation of powers*." *Id*, citing *Blank supra* at 120 (Kelly, J) and 147 (Markman, J) (emphasis supplied). Thus, "in light of separation of powers principles, the absence of any limits on the scope of the Governor's review indicates not that the review would be unlimited, but that the Legislature intended that the parameters of the review would be left to the Governor to determine." *Id* at 392-393.

The Governor is allowed such discretion because she must conform her conduct to the constitution itself. "[T]he Governor's decision . . . is entitled to great deference, for the Governor has no less a solemn obligation . . . than does the judiciary to consider the constitutionality of his every action." *Lucas v Wayne County Board of County Road Commissioners*, 131 Mich App 642, 663; 348 NW2d 660 (1984). Anything less would "run afoul of the separation of powers principle of Const 1963, art 3, §2, by virtue of which executive power is vested solely in the Governor[.]" *Id*.

Consequently, the Governor's discretion to propose or accept an amendment is not just limited by the express prohibition against expanding the definition of "eligible Indian lands." She also may not agree to amendments that would violate the constitution. The *TOMAC I* decision

---

[5]Because the "standards" test does not apply to the Governor, TOMAC's reliance on *Blue Cross & Blue Shield of Michigan v Governor*, 422 Mich 1; 367 NW2d 1 (1985), is misplaced. *Blue Cross* applied the "standards" test to a statutory delegation of power to the Insurance Commissioner, not to the Governor. *See* 422 Mich at 55 ("[T]he lack of standards defining and directing the *Insurance Commissioner's* and the actuary panel's authority renders this dispute resolution mechanism constitutionally defective."). (Emphasis supplied.) Therefore, *Blue Cross* does not apply to this case.

identifies some of those constitutional parameters. For example, amendments that impose a "regulatory obligation on the state", or create a "state agency", come dangerously close to invading the Legislature's law-making function. *See*, *TOMAC I*, 471 Mich at 325, 326. As a constitutional officer, sworn to uphold Michigan's fundamental law, the Governor is necessarily prohibited from agreeing to these or other amendments that would violate our constitution.[6]

In light of the express restriction on the Governor's amending authority and the traditional deference given to the Governor in her exercise of authority conferred by the Legislature, the Amendment Provision is consistent with the Separation of Powers Clause.

II. THE LTBB AMENDMENT IS CONSTITUTIONAL.

TOMAC asserts that the LTBB Amendment is unconstitutional "on its face" because it allows the tribal payments to be directed to the State by the Governor "without an underlying legislative appropriation[.]" (TOMAC's Appellee Brief at 15.) This argument may be disposed of quickly.

"The party challenging the facial constitutionality of an act 'must establish that no set of circumstances exists under which the [a]ct would be valid.'" *Straus*, 459 Mich at 543 quoting *United*

---

[6]TOMAC's response to this argument is circular reasoning. It says that deference to the Governor in the exercise of amending authority is irrelevant if "the underlying grant of the amendatory power by the Legislature is invalid[.]" (TOMAC's Appellee Brief at p 11, n 4.) But the "grant" of authority is *not* "invalid" precisely because the Governor, unlike an administrative agency, is trusted to exercise her discretion within constitutional bounds. The validity question turns on the deference traditionally accorded the Governor's exercise of her authority, not the other way around. Furthermore, TOMAC's statement that a "grant" of power to the Governor is a "cause for greater concern" than to an administrative agency lacks authority. (*Id*.) *Gilbert v State of Wisconsin Medical Examining Bd*, 119 Wis 2d 168; 349 NW2d 68, 75-76 (1984), did not concern a grant of power to the Wisconsin Governor and, moreover, the passage from that case quoted by TOMAC recognizes a more liberal attitude toward a delegation of legislative power to an administrative agency in comparison "to the judiciary", rather than to the Governor. The language that TOMAC cites from *Detroit* v *Detroit Police Officers Ass'n*, 408 Mich 410, 528; 294 NW2d (1980), is taken from the *dissent* and, therefore, has no precedential value.

States v Salerno, 481 US 739, 745; 107 SCt 2095; 95 LEd 2d 697 (1987) (brackets supplied by the *Straus* Court). As indicated above, the Governor may be relied upon to exercise her authority consistently with the constitution. *Sutherland, supra* 29 Mich at 323; *Lucas, supra*, 131 Mich App at 663. Certainly, the Governor could – and would – exercise her authority under the LTBB Amendment in a manner that complies with the Appropriations Clause. For example, she could direct the tribal payments to the State Treasury where they would be subject to appropriation. Because the authority given to the Governor by the LTBB Amendment may be exercised consistently with the Appropriations Clause, it is not facially unconstitutional.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above and in the State's Brief as Appellant, the State requests that this Court reverse the Court of Appeals' decision that the Amendment Provision of the Compacts and the LTBB Amendment violate the Separation of Powers Clause of the Michigan constitution.

BARRIS, SOTT, DENN & DRIKER, P.L.L.C.

By: _____

Eugene Driker (P12959)
Thomas F. Cavalier (P34683)
211 West Fort Street - 15th Floor
Detroit, MI 48226-3281
Telephone: (313) 965-9725
Special Assistant Attorneys General for the
State of Michigan

Date: July 19, 2006

tcavalier\0319665.01